

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA §
VS. § No. A-10-CR-297 LY
DAVID DIEHL §

**FIRST AMENDED MOTION FOR BILL OF PARTICULARS
AND INCORPORATED MEMORANDUM OF LAW**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, David Diehl, Defendant in the above styled and numbered cause, and respectfully moves the court for an order to compel the Government to produce a bill of particulars, and would the court the following:

I. THE INDICTMENT FAILS TO PROVIDE NOTICE TO THE DEFENDANT

Under Federal Rule of Criminal Procedure 7(f), a motion for a bill of particulars should be granted where necessary for the defendant "to prepare for trial, to prevent surprise, and to interpose a plea of double jeopardy should he be prosecuted a second time for the same offense."

United States v. Bortnovsky, 820 F.2d 572, 574 (2nd Cir. 1987). The principal function of a bill of particulars is to apprise a defendant of the essential facts of the crime for which he has been indicted, especially in instances where the indictment itself does little more than track the language of the statute allegedly violated. *United States v. Salazar*, 485 F.2d 1272, 1278 (2nd Cir. 1973). The indictment in this case tracks the language of the statute involved, and the defendant cannot divine from the indictment what the government has actually accused him of doing. The indictment fails to allege the manner and means of each offense.

In all counts the indictment uses the term “visual depiction” without giving adequate notice of the type of visual depiction. By the terms of the indictment the government could be alleging motion picture film, photographs, video, drawings or paintings. While the government does allege some specific visual depictions, they include those specific examples without limiting them to other examples. The indictment does not provide adequate notice to all of the visual depictions on which the government is basing the charges.

In all counts, the indictment includes the bare assertion that a visual depiction had been mailed and had been shipped and transported in interstate and foreign commerce.

The indictment is a bare assertion tracking the language of the statute, and provides the defendant with no notice of how exactly it is alleged that any materials had moved in interstate commerce.

The defendant cannot defend himself without an adequate allegation of the manner and means of how he violated the statutes involved here. The assertion that he broke the law, without explaining how, does not provide proper notice of the essential facts of the case. The defendant could be prosecuted for any number of “visual depictions” under the general allegations of the indictment.

The defendant is entitled to the requested bill of particulars under the United States Constitution Fifth Amendment due process and double jeopardy provisions and the United States Constitution Sixth Amendment right to effective assistance of counsel.

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully prays that the court grant this motion, and compel the Government to produce a bill of particulars, as mandated under Federal Rule of Criminal Procedure 7(f).

Respectfully submitted,

/s/ Stephen M. Orr
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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of December, 2010, a true and correct copy of the foregoing instrument was electronically filed with the Clerk of the Court, using the CM/ECF System which will transmit notification of such filing to all counsel of record.

Matt Devlin, AUSA
816 Congress Ave., Suite 1000
Austin, Texas 78701

/s/ Stephen M. Orr
STEPHEN M. ORR

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§

O R D E R

on Motion for Bill of Particulars

On this day came to be heard the Motion for Bill of Particulars filed by Defendant in the above cause and the court hereby orders that such motion be

(granted)

(denied).

SIGNED AND ORDERED this _____ day of _____, 2010.

UNITED STATES DISTRICT JUDGE PRESIDING